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474913—42

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 194

ROUL MATEUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the circuit court of appeals (R. 1090–1111) is reported at 127 F. (2d) 683.

### JURISDICTION

The judgment of the circuit court of appeals was entered March 19, 1942 (R. 1088), and a petition for rehearing was denied June 2, 1942 (R. 1112). The petition for a writ of certiorari was filed July 1, 1942. The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTES INVOLVED

The Act of June 22, 1932, c. 271, sec. 1, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides:

> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: *Provided,* That the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive.

The Act of June 22, 1932, c. 271, sec. 3, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 782 (18 U. S. C. 408c), provides:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of sections 408a and 408b of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as provided for by said sections.

## QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the conviction.

2. Whether petitioner's conviction on the substantive count is inconsistent with the jury's disagreement as to his guilt on the conspiracy count and, therefore, void.

3. Whether, in view of the jury's disagreement as to petitioner's guilt on the conspiracy count, reversible error resulted from the admission of testimony relating to acts and conversations of the other defendants outside of petitioner's presence which was admitted in proof of the conspiracy count.

## STATEMENT

Petitioner and nine others were tried in the United States District Court for the Southern District of California, on a two-count indictment (R. 2–9) charging in count one that they kidnaped one Hideichi Yamatoda and transported him from Los Angeles, California, to Mexicali, Mexico, and, in count two, that they conspired so to kidnap and

transport Yamatoda, in violation of the Federal Kidnaping Act (18 U. S. C., 408a, 408c, *supra*). Petitioner was convicted on count one, the jury disagreeing as to count two (R. 925), and was sentenced to imprisonment for three years and six months (R. 20–21).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit the conviction was affirmed (R. 1088).

Petitioner did not participate in the kidnaping of Yamatoda until after the latter had been brought from Los Angeles to El Centro, California, by other defendants. Since none of the other convicted defendants have sought review, it is sufficient to summarize the history of the conspiracy prior to petitioner's participation therein, the full facts of which are delineated in the opinion below (R. 1092–1099).

Over a period of more than a year petitioner's Japanese co-defendants conspired to obtain control of the Tokio Club, an alleged Japanese gambling syndicate, and the Japanese Film Exchange in Los

[1] Defendants Sonoda and Ota were convicted on both counts (R. 925, 926); Yuge and Yoshida were convicted on count two, the jury disagreeing as to count one (R. 926–927); Asanuma and Nakashima were acquitted by direction of the court on count one and by the jury on count two (R. 923–924); Ugawa was acquitted by direction of the court on both counts (R. 923–924); the jury disagreed on both counts as to Oswalt (R. 928); and on the Government's motion the court granted a dismissal as to Henry (R. 570). All of the convicted defendants appealed, but petitioner alone seeks review in this Court.

Angeles, California, operated by Hideichi Yamatoda (R. 37–41, 45, 128–129, 136, 305, 315–316, 401). Their *modus operandi* was to get Yamatoda out of the way by attempting to have him convicted for some crime; they twice reported him to Federal Narcotic Agents as being engaged in the importation of narcotics from the Orient (R. 37–41), and once obtained his arrest for murder (R. 40, 148–149, 305–307, 373–377, 737–739). Finally, the defendant Oswalt, Chief of Police at El Centro, California (R. 598), who was friendly with Yamatoda's rivals (R. 63, 81–84) and who was determined to put Yamatoda "behind the bars" because, Oswalt said, Yamatoda had previously tried to put him "behind the bars" (R. 777–780), procured the issuance by El Centro authorities of a warrant for Yamatoda's arrest on a gambling charge and with the help of other defendants apprehended Yamatoda in Los Angeles and brought him to El Centro a prisoner (R. 159–160, 163–165, 168–173, 214–215, 309–310, 313–315, 395–396, 398, 605–610, 701–702, 748–752, 780, 782). At El Centro, threats were made against Yamatoda's life if he did not give up control of his gambling syndicate to certain of the defendants and go back to Japan (R. 315–316, 400, 401). He was then taken to the county jail and held in custody (R. 285, 317, 403, 407–408). One of the Japanese defendants obtained his release on bail and, in company with others, forcibly carried him away from the jail in their car (R. 277-278,

281, 317–318, 480); Yamatoda attempted to escape, but was recaptured by the El Centro police and returned to the El Centro police station and the defendants threatened to take Yamatoda to Mexico and throw him in the desert (R. 268–274, 286–288, 318–323, 412–413, 415–416, 418–422, 425–428, 480–486).

Petitioner, who was a "special officer" employed at a Japanese gambling club in El Centro operated by Yoshida (R. 66, 78, 89, 90, 772), became a participant in the affair after Yamatoda had been returned to the police station. Thus, after Yamatoda had been questioned and threatened he was taken to the outer room of the El Centro police headquarters. It was then about 1:30 or 2:00 o'clock on the morning of December 24, 1938. Petioner and the defendants Oswalt, Ota, Yuge and Yoshida were there in addition to the desk sergeant and some policemen. (R. 222–223, 288, 323, 430.) Oswalt put handcuffs on Yamatoda and then tightened them (R. 238, 324, 433–434). His $2,500[2]

[2] When Oswalt arrested Yamatoda in Los Angeles the latter had on his person beneath his underclothing a belt which he wore to protect his abdomen, and in which he was carrying $2,500 in five $500 bills. This was not discovered in Los Angeles, as they searched only his pockets (R. 392–393). During the fight at the gasoline station in El Centro, when Yamatoda had escaped from the Japanese defendants and was trying to use the telephone, he pulled out one of the $500 bills and offered it to any of the bystanders who would take him to Los Angeles (R. 420). When he was taken back to the El Centro police station the $2,500 was taken from him (R. 320–321).

was returned and then Oswalt told him to "Go, get out," and pushed him out of the station (R. 324–325). Yuge, Ota, Yoshida and Oswalt came out of the station with him, petitioner preceding them, in the fashion of "a football huddle, they get somebody in the middle and take him along" (R. 291, 297, 325, 434, 499). When they got to the sidewalk, petitioner was standing at the door of a yellow coupe; Oswalt told Yamatoda to get in the front seat, petitioner held the door open and pushed Yamatoda in and then got in behind him. Another officer, Keating, was at the wheel. (R. 325, 434–435.) The coupe then started out and while they were driving along Yamatoda grabbed the wheel in an attempt to cause a collision, but petitioner pulled him back by the neck. Later they stopped at a field or ranch behind a sedan and Oswalt, Yuge, Ota, Sonoda, and Yoshida got out of a sedan and came back to the coupe. Oswalt said, "This is your last chance. Do you want to go to Mexico and die?" Yamatoda said he did not want to go to Mexico, whereupon Oswalt pulled him out of the coupe and removed the handcuffs. Petitioner was holding open the door of the "turtleback" or luggage compartment of the coupe and had a gun in his hand. At Oswalt's direction Yamatoda got into the turtleback and Sonoda got in with him, Oswalt warning Sonoda not to "monkey around," the door was closed down and the coupe started moving. (R. 326–328, 435–437.) After

about 15 or 20 minutes it stopped, and the turtleback was opened. Petitioner, standing close by, gun in hand, ordered Yamatoda to get out, saying, "If you holler I will shoot." (R. 328, 438.) Petitioner then handed some tape to Sonoda and told him to put it over Yamatoda's eyes and mouth, and then, after searching Yamatoda, ordered him back into the turtleback and warned him that if he cried out he would be shot from the front seat. Yamatoda then got back into the turtleback with Sonoda and the car started moving again. (R. 328–329, 438–439.) The car stopped once and there was a conversation in Spanish, and after the car started up again Yamatoda, who had not been taped, yelled out, whereupon Sonoda said, "If you holler you will be shot from above, so shut up" (R. 331). Five minutes later the car stopped again. Petitioner, with a gun in his left hand, again opened the turtleback and ordered Yamatoda out. Sonoda said, "This is Mexico."[3] Petitioner took Yamatoda's money (the $2,500), and told him to move on or be shot. Yamatoda ran about twenty feet, then yelled back to petitioner asking for one of the five $500 bills petitioner had taken from him. Petitioner refused to let him have that much and Sonoda ran to Yamatoda, put three or four $5 bills in his pocket, and ran back. The last Yama-

[3] Yamatoda identified Government Exhibit 48, a picture taken in Mexicali, Mexico (R. 329), as "the place I alighted from the yellow coupe" on the morning of December 24th (R. 332).

toda saw of petitioner the latter was putting his right hand in his pants pocket. Yamatoda then went over a three-foot fence and walked toward a house with a light in it. (R. 331–332, 442, 446.) At or after two o'clock that morning Yamatoda walked into a police station in Mexicali, Mexico, and about an hour later, with the assistance of two Mexican police officers and an interpreter, Yamatoda found Sonoda in a hotel room in Mexicali (R. 336, 338, 487.) A United States Customs Inspector stationed at the international border between Calexico, United States, and Mexicali, Mexico, and who had known petitioner for several years, observed petitioner driving a car from Mexico into the United States between 1:30 and 2:30 that morning, and Keating was with him. The car was "a late model cream-colored or canary-colored coupe with a long turtle back door in the back" and petitioner told the Inspector, "it's the boss' car." (R. 527–528.)[4]

On December 27, 1938, in the presence of the Japanese consul at Mexicali and Mexican Immigration officials, Yamatoda signed a statement to the effect that early on the morning of December 24th "while visiting in the City of Calexico" he inadvertently walked across the border into Mex-

[4] Another witness testified that he saw a yellow car at the Oswalt home in El Centro, where he was a dinner guest, on the evening of December 23, 1938, and that petitioner was also there at the time (R. 187–188).

ico, alone (R. 358–360). At the trial, however, he denied that he ever gave any such explanation of his presence in Mexicali (R. 363, 446–447), and stated that "I told [the consul] everything about the kidnapping, but was told 'It won't do, but if you sign this paper you can go back' " within ten or fifteen days. The consul told him, he said, "If you bring up the case of the kidnapping in Mexico, you will never be able to go back to America soon. It will take a year, or two years or three years before you can." (R. 444–445.)

## ARGUMENT

### I

Petitioner contends that the evidence is insufficient to support the verdict in that the Government failed to prove: (1) that Yamatoda was transported across the Mexican boundary line (Pet. 22–31), or (2) that petitioner "was present on the alleged kidnapping trip" (Pet. 31–33), or (3) that he made any demand for ransom or reward or knew that his co-defendants had made any such demand (Pet. 41–46). Although, as the court below said, "the whole affair is lurid and melodramatic" (R. 1092), the record plainly shows that petitioner's contentions are untenable.

1. The evidence fully warranted the jury in finding that Yamatoda was put out of the car in Mexico. Yamatoda was told that he was being taken to Mex-

ico (R. 323, 326);[5] when he was put out of the car defendant Sonoda said, "This is Mexico" (R. 446);[6] Exhibit 48 was identified as a picture of the place in Mexicali where they left him (R. 329, 332); and shortly after the kidnaping a United States Customs Inspector saw petitioner and Keating driving from Mexico into the United States at the Mexicali-Calexico border line in a car which fitted Yamatoda's description of the one in which he had been abducted (R. 527–528). In view of this evidence, it is immaterial if, as petitioner asserts (Pet. 22, 25–26), Yamatoda did not know of his own knowledge at the time, whether he was across the border when he was put out of the car.

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[5] Petitioner variously asserts that Yamatoda's testimony is unworthy of belief because of his alleged disreputable character (Pet. 2, 6, 8, 11–12, 44) and because his story is "inherently improbable" (Pet. 4, 12, 22, 31). Obviously, however, the witness' credibility was for the jury to determine. *Glasser* v. *United States*, 315 U. S. 60, 77. Furthermore, petitioner points to nothing in Yamatoda's version of what took place which is manifestly false or which in any way conflicts with known facts or scientific truths so as to render it inherently improbable (cf. *Kelly* v. *Jones*, 290 Ill. 375, 378 (1919); see note 8 A. L. R. 796 *et seq.*). Petitioner also overlooks the fact that Yamatoda's account at the trial was substantially corroborated by the testimony of other Government witnesses (see R. 73, 89, 92–93, 99–100, 127–128, 172–174, 187, 192, 193, 215–216, 218–219, 222–223, 234, 268, 277–278, 279, 285–289, 496–500, 510, 527–528).

[6] Contrary to petitioner's assertion (Pet. 28), the record shows that he was present when Sonoda made the statement (R. 331–332, 442, 446); hence his objection to its admissibility is not well taken.

2. Yamatoda expressed no doubts as to petitioner's presence on the trip into Mexico. He testified: It was petitioner who held open the car door in front of the police station and pushed Yamatoda in (R. 325, 435); when Yamatoda grabbed the wheel petitioner pulled him by the neck (R. 326); petitioner held open the door of the turtleback of the car when Yamatoda was forced into it, and later, with gun in hand, threatened to shoot Yamatoda if he cried out (R. 328); when the car stopped in Mexico petitioner, again with his gun in hand, ordered Yamatoda out, took his money and then told him to move on or be shot (R. 331). The United States Customs Inspector, moreover, was positive that it was petitioner, whom he had known for several years, who drove from Mexico into the United States at the Mexico-Calexico border in a yellow coupe shortly after the time Yamatoda claimed he was abandoned in Mexicali (R. 527–528).

3. While the evidence does not show that petitioner made any demand for ransom or reward, it does show that he benefited financially from the kidnapping to the extent of $2,500 which he took from Yamatoda at the point of a gun (R. 331). Furthermore, the application of the statute "is not restricted to cases involving pecuniary benefit to the kidnappers," for "Congress * * * intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to

himself to induce him to undertake it," *United States* v. *Parker,* 103 F. (2d) 857, 861 (C. C. A. 3), certiorari denied, 307 U. S. 642, citing *Gooch* v. *United States,* 297 U. S. 124. And since petitioner undoubtedly expected to gain favor with his chief (Oswalt) by helping his friends dispose of their rival and by helping him to gain the revenge he desired, it is clear the petitioner's motives came within the condemnation of the statute, even if he had not reaped a $2,500 reward. Finally, we submit that it is a reasonable inference from all of the evidence that petitioner could not have been unaware of the reasons why his co-defendants wanted to remove Yamatoda, and that, therefore, he knowingly aided and abetted the perpetration of the crime.[7]

## II

Petitioner contends (Pet. 33–40) that his conviction on the substantive count is inconsistent with the jury's failure to agree as to his guilt on the

[7] In this connection, petitioner now advances the bizarre suggestion that Yamatoda's abduction "could easily have been" no more than the commonplace practice of peace officers in running undesirables "out of town" (Pet. 44–46). Even if this were true, however, such a practice would be no defense under the circumstances of this case. Again, if that were all that happened, it is obvious that petitioner would have so testified, but he contented himself with mere denials of any participation in the affair (R. 768–769). On the other hand, the manner in which Yamatoda was transported across the border, robbed of his money, and then left in a foreign country, wholly belies petitioner's suggestion.

conspiracy count, because "under the facts * * * it would have been impossible for Mateus to have committed the substantive offense unless he had conspired with the others to commit it." This contention was, apparently, not raised in either of the courts below; there was no acquittal of petitioner on the conspiracy count but merely a disagreement as to that count; and, as was held by this Court in *Dunn* v. *United States*, 284 U. S. 390, 393–394, consistency in the verdict is not required.

Furthermore, petitioner does not point to any specific facts in the record which necessarily render the verdict on the substantive count inconsistent with the jury's failure to agree on the conspiracy count, and we know of none. On the contrary, as we have shown, there is ample evidence from which the jury may have found that he knowingly aided and abetted in the kidnaping of Yamatoda, even if we assume that he was ignorant of all the details of the conspiracy carried on by the other defendants (see pp. 6–9, *supra*).

Similarly, there is no merit to petitioner's contention that since the jury disagreed as to the guilt of Oswalt, his chief, "the verdict was inconsistent and void," as to him (Pet. 40–41). There is nothing in the record to show that petitioner was following Oswalt's orders, and even if he did, that fact would not excuse him. Hence, as the court below held (R. 1110), "there is nothing at all inconsistent with the verdict." See 18 U. S. C. 566.

## III

Petitioner argues (Pet. 46–48) that since the jury disagreed as to his guilt on the conspiracy count, it was prejudicial error to admit testimony relating to acts and conversations of the other defendants outside of his presence. It is plain, however, that a *prima facie* showing of petitioner's participation in the conspiracy was made, and therefore the evidence complained of was properly admitted under the rule that the acts and declarations of co-conspirators are binding upon those who subsequently join the conspiracy. *Marron* v. *United States*, 8 F. (2d) 251, 257–258 (C. C. A. 9); *United States* v. *Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *McDonald* v. *United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Laska* v. *United States*, 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689. As the circuit court of appeals stated, the adoption of petitioner's contention would "require a trial judge in each instance to foresee just what decision the jury will reach as to each alleged co-conspirator before he could rule upon the admissibility of evidence of acts and declarations of the co-conspirators" and "would practically abrogate the rule of responsibility of all members of a conspiracy for acts of the other conspirators" (R. 1104–1105).[9]

[9] Petitioner also argues (Pet. 48–49), but does not present as a question for review, that the trial court improperly lim-

## CONCLUSION

The decision below is correct; there is no conflict of decisions, nor any question of general importance. Review is sought principally upon questions of fact decided by a jury and left undisturbed by two courts, and petitioner makes no showing which would warrant further review by this Court. *Delaney* v. *United States,* 263 U. S. 586, 589–590. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
*Solicitor General.*
WENDELL BERGE,
*Assistant Attorney General.*
OSCAR A. PROVOST,
ANDREW F. OEHMANN,
*Attorneys.*

AUGUST 1942.

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ited his cross-examination of Yamatoda concerning events which occurred in Mexico subsequent to December 24, 1938, while he was in custody of the Mexican immigration officials and the Japanese consul at Mexicali (R. 452, 453–454). The information sought was properly excluded on the ground that it raised a collateral matter which, as the trial judge said, could not "possibly serve any useful purpose in this lawsuit" (R. 452). *Glasser* v. *United States*, 315 U. S. 60, 83; *Alford* v. *United States*, 282 U. S. 687, 694; *Lucas* v. *Brooks*, 18 Wall. 436, 454; *United States* v. *Manton*, 107 F. (2d) 834, 845 (C. C. A. 2), certiorari denied, 309 U. S. 664.

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